OCT 28 1954
HAROLD B. WILLEY, Clerk

No. 273 MISC.

IN THE

SUPREME COURT OF THE UNITED STATES

1954 TERM

LOUIS M. SUTTLES, PETITIONER,

vs.

COLONEL JAMES W. DAVIS, COMMANDANT
U. S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS, RESPONDENT.

CHASTINE BEVERLY, PETITIONER,

vs.

COLONEL JAMES W. DAVIS, COMMANDANT
U. S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS, RESPONDENT.

JAMES L. RIGGINS, PETITIONER,

vs.

COLONEL JAMES W. DAVIS, COMMANDANT
U. S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners Louis M. Suttles, Chastine Beverly and James L. Riggins, respectfully pray for a Writ of Certiorari and review of the judgment of the Court of Appeals, Tenth Circuit, affirming the judgment of the United States District Court for the District of Kansas, denying petitioners' Writs of Habeas Corpus. Said cases being consolidated and numbered in the Circuit Court of Ap-

peals Numbers 4908, 4909 and 4910, decided September 10th, 1954, in said Circuit Court of Appeals.

OPINIONS.

The District Court consolidated the cases of the three petitioners and heard their Petitions as a consolidated case. The Circuit Court of Appeals handled and treated the cases on the same basis. The judgment of the District Court denying the Petitions for Habeas Corpus was not reported. The judgment of the Court of Appeals affirming the judgment of the District Court was handed down September 10, 1954, and is not yet reported in the reporter system. A certified type transcript of the record on file in said appeal cases 4908, 4909 and 4910, together with typewritten copy of petitioners Brief on Appeal and respondent's printed Brief on Appeal, are before this court.

JURISDICTION.

Judgment of the Court of Appeals affirming the Judgment of the District Court was entered September 10. 1954. Jurisdiction of the Supreme Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (28 USCA 1257, 2103, 2106 and 1254). Rule 38 of the Supreme Court.

SUMMARY OF MATTER INVOLVED.

All three petitioners were privates serving in the United States Army at Fort Leonard Wood, Missouri. They were found guilty after a joint trial by General Court Martial of Premeditated Murder and two Robberies and each was given a death sentence. They have been confined at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, pending execution of the sentences.

These sentences were upheld by Army reviewing authorities, affirmed by the United States Court of Military Appeals and confirmed by the President. They filed Petitions for Writs of Habeas Corpus in the District Court of the United States for the District of Kansas. After full hearing, Petitions were dismissed and appeal taken to the United States Circuit Court of Appeals for the Tenth Circuit which affirmed the judgment of the District Court. The petitioners are colored. The Petition for Rehearing was denied by the Circuit Court of Appeals on the .... day of ....., 1954.

QUESTIONS PRESENTED.

1. That petitioners were denied effective assistance of counsel.
2. Petitioners were not advised of their rights to file a Motion for a New Trial and therefore, did not receive fair consideration by the military courts.
3. Petitioners' confessions were obtained by coersion and were therefore inadmissable in evidence.

REASONS FOR GRANTING WRIT.

(a) Petitioners were not advised of their rights to file Motion for New Trial, 50 USCA (660) by anyone and consequently their claims were not given fair consideration, in accordance with the decision of this court in Burns vs. Wilson, 346 U. S. 137.

(b) The Court of Appeals placed too narrow an interpretation on the decision of this court (Burns vs. Wilson, 346 U. S. 137) as applied to the facts of this case. See Easley vs. Hunter, 10 C. I. R. 209 F. 2nd 483.

(c) Full consideration as to the age of the three accused, intelligence and education and also other factors which threw a light on the question whether the confessions were likely the result of psychological coercion which overpower their mental resistence, was not had in these cases. Holey vs. Ohio, 332 U. S. 596; Ward vs. Texas, 316 U. S. 547; Lisenba vs. California, 314 U. S. 219; White vs. Texas, 310 U. S. 570; Chambers vs. Florida, 309 U. S. 227.

BRIEF AND ARGUMENT.

It is admitted throughout proceedings that immediately upon the conviction of the petitioners by the Court Martial, they were transported the following day to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, placed in solitary confinement under death watch, where they have since been and still are. That no defense counsel appointed by the Army to represent petitioners at the Court Martial Trial ever again interviewed them or saw them after petitioners reached the Disciplinary Barracks at Fort Leavenworth, Kansas; the District Court on Habeas Corpus found that the petitioners were not advised of their rights to file a Motion for a New Trial. (Article 73 of the Uniform Code of Military Justice 50 USC 660.) Petitioners in their Writ of Habeas Corpus and in their argument on appeal contended that Article 73 supra was unconstitutional in that it limited the time for filing such a Motion for a New Trial to a period of one year. In this connection the record shows that petitioner Riggins through counsel, filed a Motion for a New Trial. The same was filed more than a year after the Court Martial trial and was not acted upon officially by the Army officials. That neither petitioner Suttles or Beverly filed a Motion for a New Trial at all. It is the contention of the petitioners that petitioners not being advised of their rights to file a Motion for a New Trial can claim they did not receive fair consideration by the military authorities in light of the decision of Burns vs. Wilson, 346 U. S. 137.

That the standards of this court as to admissibility of confessions where allegations are made that such confessions were obtained by holding the prisoner incommunicado while he is subjected to questioning by officials; while he is deprived of services of counsel and in this case, where he is a colored person and where mob violence or mob hysteria is present, were not applied but were in effect disregarded. Chambers vs. Florida, 309 U. S. 227; Stein vs. New York, .. U. S. .., 21 USL Week 4467, 4477 (June 15, 1953).

The combined facts that these petitioners were not advised by Army counsel appointed to defend them in the Court Martial trials of their rights to file a Motion for a New Trial; the additional facts that the Army counsel appointed to represent petitioners on their appeals to military channels did not personally contact petitioners, coupled with the fact that petitioners were colored, of limited intelligence, without funds, and being held in solitary confinement under death watch, all taken together amount to a denial of assistance to counsel. Johnson vs. Zerbst, 304 U. S. 458.

This instant case is on all fours with the Burns vs. Wilson case, supra; however, in the opinion of Mr. Justice Frankfurter on rehearing clearly distinguishes this case from the Wilson case in one particular. In the Wilson case it was assumed throughout that fair consideration had been given the petitioners' claims by the Military authorities, including petitioners' right to file a Motion for a New Trial. In this case it is petitioners' contenton that since they were not advised of their right to file a Motion for a New Trial, they were in effect

denied "fair consideration" of their claims under the Wilson case.

CONCLUSION.

Petitioners respectfully pray the Honorable Court to cause the Writ to issue herein.

Respectfully submitted,

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In the Supreme Court of the United States

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v.

COLONEL JAMES W. DAVIS, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (R. 95-101)[1] is not yet reported.

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[1] "R." refers to the transcript of the record in the Court of Appeals. It is in two volumes containing 106 pages. "H.C." refers to the transcript of the habeas corpus hearing containing 383 pink pages. "C.R." refers to the 707 page transcript of the court-martial record, which was Respondent's Exhibit D at the habeas corpus hearing.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1954 (R. 102) and a petition for rehearing was denied on September 29, 1954 (R. 103-105). The petition for a writ of certiorari was filed on October 25, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, upon whom death sentences for murder were imposed by army court-martial, were denied effective assistance of counsel by reason of the alleged absence of personal contact with appellate counsel and counsel's failure to advise them of their right to petition for a new trial within one year under Article 73 of the Uniform Code of Military Justice.

2. Whether petitioners were denied due process by the admission of their written confessions as voluntary.

STATUTES INVOLVED

Article 73 of the Uniform Code of Military Justice, 50 U.S.C. (1952 ed.) 660, 64 Stat. 132, provides:

> At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered

evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, The Judge Advocate General shall refer the petition to the board or court, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition.

Article 31 of the Uniform Code of Military Justice, 50 U.S.C. (1952 ed.) 602, 64 Stat. 118, provides:

(a) No person subject to this chapter shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this section, or through the use

of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial.

STATEMENT

After a joint trial by a general court-martial, the petitioners were found guilty of premeditated murder in violation of Article 118, Uniform Code of Military Justice, 50 U.S.C. 712, and two robberies in violation of Article 122 of the Code, 50 U.S.C. 716. The evidence, succinctly summarized in the opinion of the United States Court of Military Appeals, showed the murder on September 20, 1951, of a taxicab driver whose cab was stolen by petitioners, who then robbed him, beat him, and threw large rocks at his head, causing multiple skull fractures and his death at a hospital the next day (Ex. B-5, pp. 3-5).[2] All three petitioners were sentenced to death (Ex. C-1, C-2, C-3). On appeal to the Board of Review in the office of the Judge Advocate General, the convictions were affirmed (Ex. B-4). Pursuant to Article 67(b)(1), Uniform Code of Military Justice, 50 U.S.C. 654, requiring review by the United States Court of Military Appeals of all cases in which the sentence, as affirmed by a Board of Review, extends to death, the case was appealed to that Court, which unanimously affirmed the decision of the Board of Review (Ex. B-5, No. 1641, 2 U.S.C.M.A. 451, 9 C.M.R. 81). Pursuant to Article 71(a) of the Uni-

[2] "Ex." refers to respondent's exhibits at the habeas corpus hearing.

form Code of Military Justice (50 U.S.C. 658), the President, with respect to each of the petitioners, personally took action approving the death sentences (Ex. B-6, B-7, B-10).

Thereafter, petitioners filed petitions for writs of habeas corpus in the United States District Court for the District of Kansas (R. 1-8, 33-35, 51-53). They alleged that their detention was unlawful since (1) they had been denied effective assistance of counsel; (2) they had not received fair consideration by the military courts because they were not advised of their rights to file a motion for a new trial; and (3) their confessions had been obtained by coercion, making them inadmissible. The respondent filed answers to the petitions (R. 10-16, 43-50), the petitions were ordered consolidated (R. 9), and a full hearing was held at which all three petitioners and witnesses for petitioners and the respondent testified (H.C. 1-382). The entire court-martial record was introduced in evidence as Exhibit D (H.C. 59, 61). Subsequent to this hearing the District Court entered findings of fact and conclusions of law adverse to the three petitioners and dismissed the habeas corpus petitions (R. 71-80).

On appeals by all three petitioners (R. 80-81), the judgment was unanimously affirmed by the Court of Appeals (R. 102).

ARGUMENT

Petitioners do not challenge the jurisdiction of the court-martial over their persons, or of the of-

fenses charged, or as to the sentences imposed, these being the traditional reasons for granting habeas corpus in court-martial cases. As to the confessions, they seek a redetermination of matters which were presented to and considered by the court-martial and the military reviewing authorities. The alleged denial of the right to counsel is controverted by the record and the testimony at the habeas corpus hearing. Hence, the district court properly dismissed the petitions for habeas corpus. Cf. *Burns* v. *Wilson,* 346 U.S. 137; *Whelchel* v. *McDonald,* 340 U.S. 122; *Hiatt* v. *Brown,* 339 U.S. 103.

1. Petitioners assert that they were denied effective assistance of counsel in that (a) after their court-martial convictions, army counsel appointed to represent them on their appeals through military channels did not personally contact them; and (b) they were not advised of their right to file a motion for a new trial within the one-year period fixed by Article 73 of the Uniform Code of Military Justice, 50 U.S.C. 660 (*supra,* pp. 2-3). (Pet. 3, 5, 6.) As the opinion below makes clear, these contentions are without merit.

a. At the habeas corpus hearing, it was shown that after the court-martial trial was concluded, the chief defense counsel, Captain Loyd, advised petitioner Suttles of his appellate rights. The other two petitioners were so advised by Lieutenant Casey and Lieutenant Cracraft, the counsel Riggins had requested. (H. C. 343-344.) Captain

Snyder, the Legal Officer at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, testified that he advised the three petitioners of their right to mandatory appeal in their death cases from the ruling of the Board of Review to the United States Court of Military Appeals (H. C. 252-253). In their own testimony, they acknowledged that they had received this information (H.C. 82, 115, 188).

It is true that there was no showing that military defense or appellate counsel (with the exception of civilian attorney Adams who spoke to his client, Riggins, upon entry into the case after the decision by the Board of Review (H.C. 210-211)) visited petitioners to consult with them after their transfer to the Disciplinary Barracks (H.C. 81, 115-116). On appeal before the Board of Review, however, petitioners were represented by qualified military counsel who presented a brief and argument in their behalf (Ex. B-4, pp. 11, 16, 17, 18; Ex. E-1); and the same military counsel and attorney Adams represented petitioners before the United States Court of Military Appeals (Ex. B-5; H.C. 42). No attack appears against the competency of these counsel. Since a court-martial appeal is based entirely upon the verbatim record of the trial and the allied papers accompanying it, there was no requirement that counsel consult personally with petitioners at the Disciplinary Barracks regarding their appeals. See Articles 60-67, Uniform Code of Military Justice,

50 U.S.C. 647-654. Petitioners, moreover, make no showing that if there had been personal consultations they would have been able to give any information to their counsel which would have caused a different result in the ruling on their appeals.

The army authorities cooperated fully with petitioners in the presentation of their appeals. Competent legal officers were available at the Disciplinary Barracks to advise inmates on legal problems and to transmit to them correspondence received from their appellate defense counsel; and inmates had the opportunity for private interviews with counsel (H.C. 252, 271, 297-299). At the request of the three petitioners, the adjutant of the Disciplinary Barracks wrote a letter to attorney Shenker in St. Louis, Missouri, asking that he represent them in their military appeals, but Shenker replied that his docket was too crowded to permit him to represent petitioners (H.C. 303-305; Ex. L, M).

b. The evidence was undisputed that petitioners were not advised by their defense or appellate counsel of their right to file a petition for a new trial within the one-year period prescribed by Article 73, and the lower court so found (H.C. 81, 115, 187, 208-209, 296, 299, 367-368; R. 76). Petitioners Suttles and Beverly never did file petitions for a new trial. Attorney Adams, counsel for Riggins, filed such a petition on the ground of newly discovered evidence on June 6, 1953, which was beyond the statutory one-year period after the con-

vening authority had approved the sentences, so that the Judge Advocate General was without legal authority to act on the petition. The alleged newly discovered evidence consisted principally of a statement by Suttles that he had not told the truth when the cases were tried, that Beverly had beaten the deceased, and that Riggins had had nothing to do with the beating. (H.C. 211-212, 219; Plaintiff's Ex. 1; Respondent's Ex. B-9.) Although the motion was not timely under Article 73, an officer of the Judge Advocate General's Corps conducted a thorough examination and found the allegations in the petition for a new trial to be without merit (Ex. G).

Petitioners Suttles and Beverly have never shown, and do not now show, any "newly discovered evidence or fraud on the court" within the purview of Article 73. As to petitioner Riggins, even if his petition had been timely filed, it would have been unavailing. Riggins was convicted upon the circumstantial evidence of his guilt and upon his own pre-trial statement. If the statements of Suttles and Beverly implicating Riggins were false, they could have had no bearing upon Riggins' guilt or innocence, since the court-martial had been properly instructed to consider the statement of each accused only as evidence against the accused who made it (C. R. 332, 482, 493, 547, 641). Accordingly, it cannot be said (see Pet. 5) that the absence of advice to petitioners as to the possibility of filing a petition for a new trial deprived them of a right or established that they had not received

fair consideration by the military authorities. Cf. *Burns* v. *Wilson, supra.*[3]

2. Petitioners contend that their confessions were inadmissible in the court-martial trial because they were obtained as a result of coercion and mob hysteria against them as colored people (Pet. 3, 6). The record shows, however, that this claim was properly considered and rejected in the court-martial proceedings.

a. *Petitioner Suttles*—This petitioner made three written statements, the first and second on September 21, 1951, at the sheriff's office at Waynesville, Missouri (Prosecution Ex. 39, 42) and the third on September 28, 1951 before C.I.D. agents (Prosecution Ex. 37). On the earlier date, Suttles stated that he "picked up two (2) rocks about the size of a baseball and threw at the cab driver [victim of the murder], both of them hit-

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[3] There is no substance in the suggestion (which was made below and is mentioned by petitioners here, Pet. 5, but does not appear to be presented for review) that Article 73 is unconstitutional by reason of the one-year limitation for filing a petition for a new trial. The new-trial provision for court-martial proceedings was first enacted in the 1948 amendments (A. W. 53, 10 U.S.C. 1525, 1950 Supp. III). The period is shorter than, but not essentially different from, the two-year limitation fixed by this Court on its own motion in the final draft of Rule 33, F. R. Crim. P.

As the court below correctly observed, "The due process clause assures the accused of one fair trial, but does not give him the right to petition for a new or second trial" (R. 100). Moreover, since petitioners have shown no basis for a new trial, they have no standing to challenge the validity of the limitation. The rights of petitioners to executive clemency or pardon upon a proper showing continue to exist irrespective of limitations of time.

ting him." These statements were introduced in evidence (C. R. 332, 479, 493).

There was ample prosecution evidence at the court-martial trial, including testimony by Suttles himself, that he was advised on September 21 of his right under Article 31 (*supra,* p. 3) either to make or not make a statement as he saw fit, that the statements were voluntary, and that no promises, threats, or coercion were employed (C.R. 336-337, 390-392, 402-404, 437, 444-446). The same was true of the September 28 statement (C.R. 311-314, 321-324).

Suttles testified at the court-martial that at the sheriff's office on September 21 there were about 10 people in the room and 30 or more on the outside. One intoxicated woman was making gestures indicating a cutting of his throat. (C.R. 386-387.) Suttles stated that Agent Kresse "asked me how would I like for about half of those men to get hold of me" and "how would I like to be put back in the cell with Riggins" (C.R. 387). Suttles testified he was afraid and uncomfortable with all those people around him and that he made his statement to the agents relying on their promise to return him to the stockade (C.R. 388, 390).

There was contrary evidence for the prosecution that there was no mob but only about 10 or 15 curious onlookers outside the sheriff's office, that there were no loud noises, and no threats (C.R. 415-416, 427-430, 434-439, 451, 464-465). Agent Kresse denied saying anything to Suttles about letting the

people outside "get hold of him" or about putting him in a cell with Riggins (C.R. 423).

At the habeas corpus hearing Suttles, repeating the story about the noises made by the crowd on September 21, the woman's menacing gestures, and agent Kresse's threats, stated that he made his statement because he was afraid of being lynched and was promised that he would be returned to Fort Leonard Wood (H.C. 70-72, 74-77, 95). On cross-examination Suttles was confronted with his admitted court-martial testimony that on the occasion in question Article 31 had been read to him and he understood it; that the woman who made the threatening motion was not around when he made the statement; and that his statement to the C.I.D. agents was voluntary (H.C. 86-90). Testimony by state trooper Smith disclosed there was no mob making loud noises or threats, but that the bystanders were merely curious onlookers (H.C. 242-243, 247-249).

b. *Petitioner Beverly*—This petitioner executed a written statement (Prosecution Ex. 36) before C.I.D. officers at Fort Leonard Wood on September 21, 1951, and a supplementary statement (Prosecution Ex. 41) on September 22. In the statement of September 22 Beverly admitted that he stole the cab driver's wallet and saw Suttles and Riggins attack the driver with rocks. These statements were introduced in evidence (C.R. 547).

At the court-martial trial it appeared that Article 31 had been read and explained to Beverly in

terms which he understood (C.R. 499-501). Prosecution evidence was to the effect that no threats, promises, or coercion were employed to induce Beverly to sign his statements (C.R. 505-506, 518-521, 544). No evidence was introduced to show that Beverly's statements were involuntary, and he elected not to testify as to the circumstances regarding the taking of his statements (C.R. 536-537).

At the habeas corpus hearing Beverly testified that he made his statement on September 21 because a state trooper "threatened to take me to Waynesville and he had a guy down there that could make me talk a plenty, and the C.I.D. told me if I go and make a statement I would probably come off with a light sentence and that would leave Riggins out in the boat with the monkey on his back by himself" (H.C. 179, 183). He stated that he made his statement at Fort Leonard Wood before he was taken to the sheriff's office at Waynesville, where he did not make any statement (H.C. 192-193, 203). Consequently his testimony that mob violence at Waynesville made him fear lynching (H.C. 182) had no bearing on the voluntary nature of his written statement.

c. *Petitioner Riggins*—This petitioner on September 23, 1951, executed a written statement before C.I.D. agents at Fort Leonard Wood (Prosecution Ex. 40), which was introduced in evidence (C.R. 641). He admitted his presence at the scene of the crime with the other two petitioners and

said that he washed the blood off his clothes after being brought back to the stockade.

Prosecution evidence at the court-martial trial disclosed that prior to the execution of Riggins' statement, Article 31 had been explained to him, so that he understood his rights (C.R. 550-551, 581). Riggins testified that he understood he did not have to make a statement unless he wanted to, and that a statement could be used against him in a court-martial (C.R. 595). Prosecution evidence showed that, although Riggins was informed that Suttles and Beverly had made statements, no promises, threats, or violence were employed to obtain his statement (C.R. 553-554, 566).

At the habeas corpus hearing, Riggins testified that prior to giving his statement he was placed at the army stockade in a segregated "black box" cell [4] covered with water and that his shoes were taken from him. His testimony was that he made the statement in order to take the "monkey off his back," which Suttles and Beverly had placed there by making statements, and to be released from the "black box," as the agents had promised him he would be. (H.C. 102-106.) At the court-martial trial Riggins had given substantially similar testimony (C.R. 573-580). However, he also admitted that the wet condition of the cell floor on September 21, 1951, was caused by a previous scrubbing,

[4] At the court-martial trial Suttles, in testifying as to voluntariness, did not mention the "black box" as affecting his confession, and Beverly did not testify concerning voluntariness (C.R. 536-537).

that this water dried over night, and that the floor was not wet after that (C.R. 578, 586-587). Before he made his statement, he had been furnished with a mattress and blankets to use on his army cot in the cell (C.R. 623-625). Riggins testified that no one threatened or used violence against him in order to obtain his statement (C.R. 594).

From the evidence detailed, it was clear that, although there was some conflict, the court-martial had the right to resolve the conflict in favor of the prosecution and to rule that the confessions were voluntary and admissible. This question was also decided adversely to petitioners in the Staff Judge Advocate's review, and in the decisions of the Board of Review and the United States Court of Military Appeals (Ex. B-1, pp. 42-49; Ex. B-4, p. 10; Ex. B-5, pp. 5, 6). As the court below held, in view of this careful consideration at every stage of the appellate procedure, the "district court was without power to try the issue de novo" (R. 101). Cf. *Burns* v. *Wilson, supra,* 346 U.S. at 146; *Collins* v. *McDonald,* 258 U.S. 416, 420-421.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1954.

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